IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1076974 AND ALL OTHER SEAMEN'S DOCUMENTS
Issued to: Josef W. WALTERS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1872

Josef W. WALTERS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 24 July 1970, an Examiner of the United States Coast Guard at New York, N.Y., suspended Appellant's seaman's documents for one month outright plus three months on twelve month's probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a lounge and veranda steward on board SS MARIANA under authority of the document above captioned, on or about 6 April 1970, Appellant, when the vessel was at Buenaventura, Columbia:

(1) wrongfully appeared naked on the promenade deck at about 0230; and

(2) wrongfully masturbated in a public area, to wit the promenade deck, under #1 lifeboat, at about 0230.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of several witnesses.

In defense, Appellant offered in evidence his own testimony, that of a witness, and certain documents.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner entered an order suspending all documents issued to Appellant for a period of one month plus three months on twelve months' probation.

The entire decision was served on 29 July 1970. Appeal was timely filed on 2 August 1970. Although Appellant had until 16

February 1971 to perfect the appeal he has added nothing to initial notice.

FINDINGS OF FACT

On 6 April 1970, Appellant was serving as a lounge and veranda steward on board SS SANTA MARIANA and acting under authority of his document while the ship was in the port of Buenaventura, Colombia.

On the night of 5 April 1970 Appellant had been working in the vessel's "Club Andes" where he was serving drinks to passengers who were attending an entertainment provided by a native dancing group. Although Appellant's normal evening working hours were from 1750 to 2400, he worked to the end of the party in the Club Andes and did a certain amount of cleaning up afterward.

During the course of his service at the party, Appellant had three drinks. After the party he had two drinks of gin, the second of which he took to his room. While changing clothes to go ashore he had two or three drinks of whiskey. He went ashore and walked to the Hotel Miramar where he met and talked with a girl named Gloria, and drank some beer. Between 0130 and 0200 he was briefly in the company of another member of the crew who took a room at the hotel and spent the night there with a girl who had been in his company when he was talking to Appellant.

Shortly before 0230 Appellant was seen by a watchman aboard the vessel coming out of the Club Andes with no clothes on. Appellant walked outside to the starboard promenade deck. The watchman called the third mate who had the 000-0400 watch. The mate saw Appellant naked under the #1 lifeboat on the promenade deck, a well lighted place, masturbating and ejaculating. The mate, who recognized Appellant, took him to his room.

Appellant was notified by the master of the vessel on the next day that witnesses had observed him in the performance of the acts set out above. When the vessel was next at Buenaventura Appellant obtained from the Hotel Miramar a receipt for payment for a room at the Hotel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the evidence does not support the Examiner's findings. In so urging Appellant points to his own evidence tending to prove that he was not aboard the ship at about 0230.

APPEARANCE: Samuel Segal, Esq., New York, N.Y.

OPINION

I

This case resolves itself to a question of credibility and reliability of witnesses. It is the function of the trier of facts to evaluate the evidence presented to him, to resolve discrepancies when they exist, and, when appropriate, to explain why he accepts one version of events as more reliable than another. It is my policy not to consider an appeal from an examiner's order as a trial de novo If, on search of the record, I find that an examiner's findings are supported by substantial evidence of a reliable and probative nature, the test which is applied in judicial review of administrative proceedings under R.S. 4450 and 46 CFR 137, O'Kon v Roland (1965), D.C., S.D., N.Y., F. Supp. 743, and Ingham v Smith (1967), D.C., S.D., N.Y., 274 F. Supp. 137, I will adopt the finding of the hearing examiner. I might note in passing, however, that the litany of "substantial," "reliable," and "probative" with respect to weight of evidence in administrative proceedings appears to me to be redundant. Others may perceive subtleties of distinction, but I cannot conceive of evidence which is "substantial" but not reliable and probative, which is "probative" but not substantial and reliable.

To satisfy one who is chained to the litany, I hold that the evidence upon which the Examiner here relied is "substantial," "reliable," and "probative." In a legal shorthand, I could just as well say that the evidence upon which the Examiner relied was of the quality and quantity ("quantum" might be considered better) required in administrative proceedings. The concept "preponderance of the evidence" does not govern these administrative proceedings, but rather the concept of "substantial evidence" prescribed by 5 U.S.C. 556(d). Nor will I regard an appeal as a hearing de novo, else there would be little point in my delegating to examiners the authority to make initial decisions on the record.

II

The evidence relied upon by the Examiner in this case was the eyewitness testimony of the mate of the watch at the time of the offenses found proved. Appellant argues that the mate identified the wrong room to which he escorted Appellant. This does not, however, undermine the testimony of the mate that he knew Appellant by name before the episode in question, that he recognized Appellant immediately upon seeing him under the lifeboat, and that he saw Appellant do what he was doing. When Appellant argues that the mate did not further identify Appellant's naked body by citing

distinctive marks on parts of his body that could not miss the sight of a witness who saw him in the condition in which the mate found him, I am less than impressed. Nothing in the record indicates that the mate should have been familiar with Appellant's body other than with the portions he would normally see. It was precisely on his recognition of Appellant's face that the mate's identification was made.

III

Against this Appellant posed his defense of "alibi." He was, he says, at the Hotel Miramar at the time in question since he had checked into the Hotel and had stayed all night. This defense, while inconsistent with his stated position before the master of the vessel, a position also asserted in some testimony before the Examiner, that he did not recall having performed the acts alleged and found proved, is not precluded as an effort by Appellant to persuade the Examiner that he was not aboard the vessel at about 0230. If Appellant had been able to persuade the Examiner that he was in a room at Hotel Miramar at 0230, and not on the ship, there is no doubt that the "alibi" would have been accepted, even though the "I don't remember" statements might have been weakened by the firm recollection of Appellant that he had checked into the hotel room before 0230 and had gone to sleep.

There were two pieces of evidence offered to the Examiner in the effort to corroborate Appellant's claim that he was not aboard the vessel at 0230.

One was the testimony of a witness who said that he and a girl were drinking with Appellant at the Hotel Miramar between 0130 and 0200. This testimony does not tend to corroborate that Appellant checked into a room at the Hotel Miramar some time before 0230.

One other piece of evidence offered by Appellant to corroborate his claim that he was at Hotel Miramar at 0230 on 6 April 1970 was a receipt that he procured from a clerk at the Hotel when the vessel was at Buenaventura on the return trip to New York, which might lend credence to the claim that he had spent the night at the Hotel and had not returned to the vessel prior to 0230.

I must note here that this hotel receipt for payment of fee and tax for a hotel room was treated most unusually by the Examiner. The document was accepted as marked for identification but the Examiner refused to accept it into evidence, giving as his ultimate reason the fact that he had permitted Appellant, as witness, to testify freely as to the contents of the document which he had before him at the time of his testimony. I cannot understand the rationale here in view of the ordinary rule that a

document is the best evidence of the contents thereof and that parol evidence should be admitted as to the contents of a document only when the document itself can be shown, for good cause, to be unproducible. Nor can I understand how, if the document itself is held to be excludable from evidence, oral testimony can be accepted as to what the document says. This is what occurred, however. The document was not admitted into evidence although Appellant was permitted to testify freely about the contents of the document.

For purposes of this appeal I have treated the hotel receipt as having properly been admitted into evidence.

Appellant's own witness undermines the probative value of the receipt obtained by Appellant on the vessel's next call at Buenaventura. He stated flatly that the receipt was automatically issued at the time of registration and that his own receipt he had immediately turned over to the girl who spent the night with him. I am not faced with a claim by Appellant that he spent the night with a girl to whom he turned over the receipt for the hotel room but I see good reason to reject the receipt he produced as substantial, reliable, or probative evidence in view of the fact that it was procured many days after the alleged use of the room and Appellant's own witness testified that issuance of the document was automatic on the renting of the room.

There is another fact, moreover, which completely destroys the reliability of the receipt produced by Appellant as corroboration of his alibi. On Appellant's own testimony, he could not have checked into a room at the Hotel Miramar before 0200 on 6 April 1970. The receipt, however, is dated 5 April 1970.

CONCLUSION

Surveyed under any applicable test, the Examine's findings are unassailable. I need not enter upon the nature of the order which has not been attacked as too severe.

ORDER

The order of the Examiner dated at New York, N.Y., on 24 July 1970, is AFFIRMED.

T. R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 10th day of April 1972.

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